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the defendant a license to manufacture and sell the patented article within a specified time and territory, covenanting to "faithfully protect" against infringements. The defendant was to pay *pro rata* royalties on the number sold, the amount of which was to total a certain minimum sum *per annum*. During the specified time the patent and contract were assigned to plaintiff. The plaintiff sued for a deficit of the minimum sum. The defendant proved infringements. *Held*, that the contract was personal to the plaintiff's assignor and not assignable, and that by the assignment the assignor rendered the further performance of the agreement to protect the defendant impossible, and thereby discharged the defendant as to minimum royalties.

When personal performance is the essence of a contract, that is, a condition precedent to the assignor's rights, the contract cannot be assigned, and performance by the assignee will not enable him to enforce the rights. *Brit. Wag. Co. v. Lea & Co.* (1880) 5 Q. B. D. 149; *Robson v. Drummond* (1831) 2 B. & Ad. 303. Where personal performance is not the essence of the contract, that is, where it is not a condition precedent, the contract can be assigned and performance by the assignee will enable him to enforce the rights. *Sears v. Conover* (1866) 3 Key. (N. Y.) 113; *Tyler v. Barrows* (1868) 6 Rob. (N. Y.) 104. If the assignor's duty is such that his executor or administrator would be bound to perform it, then it is not personal, and a vicarious performance would be a fulfilment of conditions and would enable the assignee to enforce the rights. *Devlin v. Mayor* (1875) 63 N. Y. 8, 16; *Woods v. Ridley* (1854) 27 Miss. 119; *White v. Commonwealth* (1861) 39 Pa. St. 167. An assignment does not free the assignor from his liabilities and duties and impose them solely on the assignee. *Arkansas Valley Smelting Co. v. Belden Min. Co.* (1888) 127 U. S. 379. But if the assignee undertakes to enforce the right given to him by the assignor, he must show that all conditions precedent to the existence of such right have been performed either by the assignor or by himself. *Tolerton & Stetson Co. v. Anglo Cal. Bank* (1901) 112 Ia. 706; *Atlantic N. C. R. R. Co. v. Atlantic & N. C. R. R. Co.* (1908) 147 N. C. 368; *Rockwell v. Edgcomb* (1913) 72 Wash. 694. Hence, it is submitted that the decision in the principal case is correct, there being no performance on the part of either assignee or assignor of the conditions precedent to the right to royalties.

F. C. H.

CONTRACTS—CONDITIONS PRECEDENT AND SUBSEQUENT—BURDEN OF PROOF.—*DAVID v. CITY NATIONAL SECURITIES COMPANY* (1916) 161 N. Y. S. 174.—A assigned to the defendant certain accounts to be collected by the latter and paid over to third parties. If a certain event took place the defendant was then to reassign to A except that he was not to reassign unless the said third parties performed according to other conditions named in the agreement. The plaintiff received an assignment of the same accounts from A, and in this action sought to force the defendant to transfer them to him. He alleged generally that all conditions had been performed. *Held*, that the conditions were conditions subsequent and should have been pleaded and proved by the defendant.

A condition precedent is a condition which must be performed before a liability arises. *Van Buskirk v. Kuhns* (1913) 164 Cal. 472. This case also affirms the well-established rule that a condition precedent must be averred and proved by the plaintiff. A condition subsequent is a condition which is to be performed subsequent to the creation of the liability. Cf. *Semmes v. Hartford Insurance Co.* (1891) 13 Wall. (U. S.) 158. The burden of proving a condition subsequent is on the defendant. In many cases the courts have apparently mistaken a condition precedent for a condition subsequent. Typical of this class of cases are, *Gray v. Gardner et al.* (1871) 17 Mass. 188; *Moody Insurance Company* (1894) 52 Oh. St. 12; *Williams v. U. S. Mutual Accident Ass'n* (1895) 147 N. Y. 693. In all of these cases the courts placed the burden of proving performance of the condition on the defendant. It may be that in these cases the wording of the contract tended to confuse the courts, and especially in the insurance contracts where the words "but if" are often employed to introduce the condition. In the principal case, however, there are no misleading words in the agreement and it appears clearly that the defendant was to be under no duty to reassign to A unless, and until, the conditions named were performed. The conditions, though obviously subsequent to the formation of the contract, were clearly precedent to a right of action in the plaintiff, and were therefore conditions precedent. As such, the court should have placed the burden of pleading and proving them on the plaintiff. The true test as to whether a condition is genuinely precedent or subsequent is: Does the liability of the defendant arise before or after performance of the condition? If the former, it is a condition subsequent; if the latter, it is a condition precedent. The practical significance of the distinction is well shown in an able dissenting opinion by Mr. Justice Doe in *Kendall v. Brownson* (1869) 47 N. H. 186, 196. If the burden of proof is on the defendant, then in a case where the evidence is in equilibrium the defendant loses. The courts by mistaking a condition precedent for a condition subsequent may, under the existing rules of pleading, cause a defendant to lose a decision which he should justly win.

C. M.

CONTRACTS—EXCUSE FOR NON-PERFORMANCE—WAR AS CONTINGENCY BEYOND PROMISSOR'S CONTROL.—*DUCAS v. BAYER Co.* (1917) 163 N. Y. S. 32.—In June, 1914, the defendant agreed in writing to deliver to the plaintiff a certain amount of dyestuffs, stipulating that it should not be held accountable for delays due to contingencies beyond its control. After the outbreak of the war which finally cut off the supply, it had on hand, or received, more than enough goods to fully perform all written contracts. Instead of filling these it made a ratable distribution of the goods among all its regular customers. *Held*, that the contingency which actually caused the non-performance of the contract was not an inadequate supply of goods, but the *pro rata* distribution of such goods as defendant had.

The present war was held to be no excuse for the failure of a German firm to deliver to an American firm Belgian antimony according to agreement. *Richards & Co. v. Wreschner* (1915) 156 N. Y. S. 1054;